Supreme Court, U.S.
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No. 85-1107

In the Supreme Court of the United States

October Term, 1985

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18, *et al.*,
Petitioners,

vs.

WILLIAM F. MURPHY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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Upon a review of the Respondent's Brief in Opposition, it is apparent to petitioners that clarification of the respondent's interpretation of the facts and relevant issues in the instant case is necessary.

ARGUMENT

I. THE PETITIONERS ARE NOT BARRED FROM HAVING THIS COURT CONSIDER THE PROPER LEGAL STANDARD TO BE APPLIED IN CALCULATING FEES UNDER THE COMMON BENEFIT RATIONALE, EVEN WHERE THE ATTORNEY FEE AWARD WAS BASED SOLELY UPON AFFIDAVITS AND BRIEFS SUBMITTED BY COUNSEL

The respondent argues at pages 34-39 of Respondent's Brief in Opposition, citing *Blum v. Stenson,* 104 S. Ct. ....., 79 L. Ed. 2d 891 (1984), that the petitioners are barred from contesting the calculation of the amount of attorney fees because prior to receiving the affidavits of attorneys submitted by respondent, regarding prevailing hourly rates, they agreed to have the court calculate the amount of attorney fees, according to the respondent, because the petitioners failed to identify any bases for reducing the number of hours or hourly rate. The scenario presented by the respondent is nearly identical to that which transpired in *City of Riverside v. Rivera,* 763 F.2d 1580 (9th Cir. 1985), *cert. granted,* No. 85-224.

According to the Petition for Writ of Certiorari in the *Rivera* case, the district court in that case awarded attorney fees although there was no evidence submitted be-

yond attorney's affidavits and the arguments submitted by the parties in their briefs on the attorney fee issue. Also in *Rivera,* the plaintiff's motion for attorney fees failed to indicate whether the hours submitted were taken from contemporaneously kept time records, nor did the time records separate out pre-litigation time, litigation time, travel time, or other duplicative time. Nonetheless, the district court in *Rivera* determined the amount of fees and refused to reduce the amount of the award to reflect the arguments made by the defendant regarding the application of the *Johnson* factors. The Ninth Circuit Court of Appeals affirmed the decision.

This Court has granted certiorari in *Rivera* to consider the proper standards within which a district court may exercise its discretion in awarding attorney fees under 42 U.S.C. § 1988. The petitioners in the instant case pose the same question as applied to the common benefit exception to the rule on attorney fees, as opposed to the statutory exceptions. As in *Rivera,* the fact that the attorney fees calculation was based on no more evidence than affidavits and briefs submitted to the court, does not bar the review of the proper legal standard to be utilized in calculating the amount of attorney fees. Also as in the *Rivera* case, the petitioners in the present case submitted briefs to the district court which thoroughly analyzed the standards to be applied in calculating the fees and the excessiveness of the fee award. Thus, in the instant case, the petitioners should not be barred from submitting for this Court's determination, the questions presented in the Petition for Writ of Certiorari regarding the proper standards to be applied by the district court in calculating attorney fees under the common benefit rationale.

II. THE RESPONDENT INCORRECTLY ASSERTED THAT PETITIONERS SEEK REVERSAL OF THIS COURT'S HALL v. COLE DECISION AND THAT THE COMMON BENEFIT FEE DETERMINATION WAS NOT ARGUED ON APPEAL, WHILE OMITTING AN EXPLANATION FOR HIS STATEMENTS TO THE SIXTH CIRCUIT THAT RESPONDENT WOULD HAVE TO APPLY HIS $10,000 IN COMPENSATORY DAMAGES TO PAY HIS ATTORNEY FEES

The Respondent's Brief in Opposition includes a description of the power of attorney arrangement between Murphy and his counsel, and argues that the petitioners cannot now assert that the award and calculation of the common benefit attorney fees was erroneous based on the absence of an obligation to pay any fees to his attorneys.[1] In so doing, the respondent fails to address his statements to all involved at the appellate level that Murphy would have to pay his attorney fees out of his $10,000 in compensatory damages.

The appellate argument contradicts the respondent's assertion to this Court that the existence of a fee obligation is not an essential precondition to a common benefit fee award.[2] Furthermore, the petitioners did appeal to the Sixth Circuit the award of fees under the common benefit rationale, as well as the improper calculation of the fee award. The power of attorney discussed herein was attached to affidavits which were before the appellate court.

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1. Respondent's Brief in Opposition, pp. 51-56.

2. Respondent's Brief in Opposition, p. 56. Respondent offers no case law to support such a conclusion, which directly conflicts with the common benefit cases cited in petitioners' brief.

Respondent cites *Cole v. Hall,* 462 F.2d 777 (2d Cir. 1972), at pages 55 and 56 of Respondent's Brief in Opposition, to support his theory that even absent a fee obligation to plaintiff's counsel, a common benefit fee award is justified. Such a citation is unpersuasive as applied to the present case because in that case the parties stipulated to the amount of the fees. The court further stated that it need not address the issue as to whether there could be a fee award if the services were gratis, because both the plaintiff and his counsel bore the costs of the litigation. Clearly the present case is distinct and petitioners in no way seek a reversal of the *Hall* decision.

III. BY RESPONDENT'S OWN DESCRIPTION DURING THE APPELLATE PROCEEDINGS ANY COMMON BENEFIT FEE AWARD WAS UNWARRANTED AND THE METHOD OF CALCULATING THE FEES WAS INCORRECT

At page 42 of the Respondent's Brief in Opposition, the respondent correctly asserts:

> The reasonableness of the attorney fees awarded is not to be judged by the personal relief Murphy achieved. It is rather to be viewed in light of the substantiality of the benefit conferred upon all the members of the Union.

Respondent then describes on page 44, how Murphy "did much more" for the Union members than merely advancing their rights through the vindication of his Section 411 rights, when he exchanged his $150,000 punitive damage award against the Union for the introduction of "a series of democratic reforms in the governance and administrative processes of the Union." Regarding the reforms he pur-

portedly introduced, respondent further states at page 45 of the brief to this Court, "For the first time, candidates for union office are entitled to speak to the membership on behalf of their candidacies." The respondent then includes a description of laudable changes in the referral system, all in an attempt to establish the substantial reforms he initiated in exchange for his punitive damage award. The thrust of the respondent's position is that because his litigation resulted in such substantial and necessary reform for the Union members, he is entitled to attorney fees under the common benefit rationale and the computation of such fees was properly determined.

However, during the proceedings in the Sixth Circuit Court of Appeals in the present case the respondent repeatedly denounced the effectiveness of the reform plan. One headnote in Murphy's Brief of Plaintiff-Appellee/ Cross-Appellant included the following description of the same hiring hall plan:

> . . . The Court Below Erred, However, In Accepting a Plan Which did no More Than Allow Candidates to Speak for Five (5) Minutes at Pre-Election Meetings and Required the Printing in the Union's House Organ of the Text of Title I of the Labor Management Reporting and Disclosure Act of 1959 and Notices of the Availability of the Union's By-Laws and Constitution and Certain Federal Labor Publications, in Satisfaction of its "Democratization" Conditions and Thereafter Vacating the Punitive Damage Award.

The plaintiff-appellee below criticized the reform plan proposed by the Union, describing various aspects of the reform plan as offering no more to the Union members than the reprinting of "the Declaration of Independence

and the lyrics of 'Yankee Doodle' ";[3] as "scarcely qualif[ying] as a 'reform' ";[4] as "not realistically respond[ing] to the expressed concerns of the Court. It does not reach and resolve the problems giving rise to the present litigation";[5] as not "meaningfully promoting the cause of Union democracy";[6] and as serving "no useful purpose whatsoever."[7] The plaintiff-appellee below also referred to the lower court's decision as follows: "By any fair analysis of the impact of the Defendants' Plan upon the desired goal of democratizing the channels of communication with Local 18, it is clear that the Court below erred in holding that the Defendants' Plan entitled them to the grant of such relief."[8]

It seems that while the respondent still thought that he was entitled to a statutory fee award, or possibly a bad faith award, he regarded the benefit to the membership arising from his litigation to be minimal. Before this Court, however, he touts his reforms on behalf of the Union membership in exchange for his punitive damage award, arguing that the award was justified and that there was no reason to reduce the amount of the award. For the reasons asserted in the Petition for Writ of Certiorari, the fee award under the common benefit exception to the American Rule and the method used to calculate such fee award should be reviewed by this Court.

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3. Brief of Plaintiff-Appellee/Cross-Appellant, p. 47.
4. Brief of Plaintiff-Appellee/Cross-Appellant, p. 47.
5. Brief of Plaintiff-Appellee/Cross-Appellant, p. 48.
6. Brief of Plaintiff-Appellee/Cross-Appellant, p. 48.
7. Brief of Plaintiff-Appellee/Cross-Appellant, p. 49.
8. Brief of Plaintiff-Appellee/Cross-Appellant, p. 50.

CONCLUSION

The petitioners urge this Court to grant their Petition for Writ of Certiorari, in order to eliminate the conflicts and confusion created by the Sixth Circuit's fees decision based on the common benefit rationale.

Respectfully submitted,

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